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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 125.

FRANCIS WINSLOW ET AL., APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

BRIEF ON BEHALF OF APPELLEE.

G. E. HAMILTON,
M. J. COLBERT,
Counsel for Appellee.

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I.

STATEMENT OF THE CASE.

This is an appeal from the Court of Appeals of the District of Columbia, reversing the decree of the Special Term of the Supreme Court of the District, and remanding the cause to that court with directions to restore the injunction prayed for in the bill, and to make the same perpetual.

The bill was filed by the Baltimore and Ohio Railroad Company against the trustees of the estate of Catharine Pearson, deceased, to enjoin the prosecution of certain suits at law brought by said trustees against the Railroad Company, one of said suits being a landlord and tenant proceeding to oust the Railroad Company from the possession of the property in controversy, and the other to recover the value of the use and occupation of said land by the Railroad Company from and after August 1, 1897, at which

time the appellant's claim that the rightful possession of said land by the Railroad Company ceased. The prayers of the bill were for a specific performance of a contract of sale, claimed to be existing between the parties, for the execution of a formal lease for five years from 1897, and for an injunction against the prosecution of the two suits at law above referred to.

By act of Congress of July 25, 1866 (14 Stat. p. 250), the Baltimore and Ohio Railroad Company was authorized to extend to and within the District of Columbia its Metropolitan branch, and in 1872, when the work of constructing said branch was under way, the line of said branch, as projected, ran through the corner of square numbered seven hundred and ten (710), in the city of Washington, D. C., and it became useful for the company to acquire for the purposes of a right of way, lots 9, 10, 11 and 12, in said square. It appears (Rec. p. 11, Complainant's Exhibit No. 5) that negotiations for the purchase of said lots were entered upon by the Railroad Company and the trustees of the Pearson estate, but by reason of some defect in the title a conveyance of the land could not be made, and as the immediate use of the property was necessary, a lease was made, but in such form as would compel the transfer of the lots at the price agreed upon whenever title could be given, the rent reserved in the lease representing 6 per cent interest upon the purchase price, which was $12,592, or at the rate of 30 cents per foot for these lots, which contain 41,975 square feet of ground.

The property in controversy was part of the estate of Catharine Pearson, deceased, and by the terms of her will (Rec. p. 26) she devised all the rest and residue of her estate (including the property in controversy) to Patterson, Philip and Cox, trustees, in trust for the sole and separate use of her daughter, Eliza Patterson, for life, and to permit her, by herself, or her attorney, appointed in writing, to be signed by her, to receive the annual income, her receipt, or

that of her attorney, to be an acquittance to any person charged with the payment of such income, and, if she pleased, to occupy and use the property for her own account, and—

> "if at any time the said Eliza Patterson shall, in writing to be signed by her in the presence of and to be attested by a subscribing witness, desire, the said trustees to sell any part of the estate held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said trustees to sell the same for such purpose only."

A sale of the property being impracticable in 1872, a lease bearing date August 1, 1872, was executed by the trustees, but not signed by the life-tenant, leasing the land in controversy to the Railroad Company for five years at the annual rent of $755.55 and containing the provision that the trustees should convey the fee at any time during the term of the lease to the Railroad Company upon the payment of $12,592. The lease contained the further provision that at the request of the company, the trustees would renew the lease with all its privileges for another term of five years or until the trustees should be prepared to convey a good title, and in the event that the company should omit to make a request for a renewal of the lease, the trustees were required to notify the company of the expiration of the term demised and require it to exercise its option of renewal, the privilege of renewal to continue for three months after such notice.

This lease was not signed by Mrs. Patterson, the life tenant, but rent was regularly paid until 1883, at which time (on February 1) a new lease was executed by the trustees and signed by Mrs. Patterson as well, similar in all respects to the lease first mentioned, and giving the company the right to a further renewal of five years.

On October 17, 1892, a similar lease from Cox, Winslow,

and Jay, trustees, was prepared, but was actually executed by Winslow only, Judge Cox at that time having resigned as trustee, and Mr. Jay, the other trustee, being absent in Europe. This lease was not signed by Mrs. Patterson, but she continued to receive rents thereunder, and between 1892 and 1897 she wrote the several letters appearing on pages 62, 63, and 64 of the Record, calling upon the company to pay the semi-annual rent. In one of these letters (Rec. p. 63) she directs the rent to be sent to Mr. Winslow, trustee of her mother's estate, and in another of the letters (Rec. p. 64) she refers to "the interest upon the money due me by the Baltimore and Ohio Railroad Company for the use of my property."

This was the condition of affairs at the time of the expiration of this lease, in August, 1897.

On August 4, 1897, the company notified Winslow, Jay, and Cox (Rec. p. 11) of its desire to renew the lease. This letter was forwarded to Judge Cox, who replied under date of August 18, 1897, to the effect that he was no longer trustee, and that Mr. Winslow was attending to Mrs. Patterson's affairs, as Mr. Jay was in Europe.

On August 10, 1897, the company again notified the trustees of its desire to renew the lease, and this letter was forwarded to Mr. Winslow (Rec. pp. 36, 50). Under date of September 27, Mr. Winslow replied:

> "We are now prepared to convey the property with a perfect title, and prefer executing such conveyance to renewal of the lease."

This formal notice was referred to in another letter dated September 27, 1897, addressed to the company's counsel (Rec. p. 11), in which Mr. Winslow states in substance that the renewal of the lease had always been made because of the fact that the trustees were not in a position to convey title, and he adds: "I suggest, as we are now able to furnish a satisfactory title, the present as a suitable time to transfer the property."

A copy of the proposed new lease was at this time sent to Mr. Winslow. The rent from August 1, 1897, to February 1, 1898, became due, and a voucher therefor payable to Mr. Winslow was sent to Thomas J. Fisher & Co., the general agents of the estate. In view of Mr. Winslow's absence in Nicaragua, the voucher was sent to Mrs. Patterson, who, under the terms of her mother's will, was entitled to receive the rent directly. Mrs. Patterson returned the voucher to the company (Rec. p. 11), suggesting that she could not have it cashed without Mr. Winslow's signature, and asking that the voucher be made payable to herself or to Judge Cox and the other trustees, as had been done for many years, in order that she might get the money thereon. The company declined to do this, but upon an arrangement between Mrs. Patterson, Thomas J. Fisher & Co., the voucher above referred to was indorsed "Francis Winslow, by Thomas J. Fisher & Co., attorneys," and on such indorsement, the money was paid to Mrs. Patterson. This check was made out for the same amount as had always previously been paid, and was a distinct recognition on Mrs. Patterson's part of the renewal of the lease. When the next instalment of interest became due in August, 1898, Mr. Winslow declined to negotiate the voucher for the rent, claiming that the rights of the company had been terminated by his notice of September, 1897, and that the company was then occupying the property as tenants at sufferance. The rent for the prior six months was not, however, returned by Mr. Winslow, and the company disputed the contention of Winslow and insisted upon its rights as lessee, claiming that the notice of September 27, 1897, given by Winslow, was not in sufficient form, and contained no definite refusal to renew the lease, but simply asserted a readiness to convey and a preference to sell rather than to lease; that the succeeding vouchers for rent, forwarded to Mr. Winslow and made payable to his order, were retained until January 5, 1900, when they were returned to the company, and a check given for the

aggregate amount thereof under the agreement that the payment of this amount and its acceptance should be without prejudice to the rights of the parties, respectively, and this agreement appears in the Record.

Under this agreement negotiations were conducted for the settlement of the differences between the parties, but without success, and the company's position is fully set forth in a letter dated February 18, 1899, from J. D. McCubbin to Francis Winslow, trustee, and appearing on page 12 of the Record.

On January 23, 1900, the offer of the trustee, made through Messrs. Carlisle & Johnson, to rent the lot referred to at $1,500 per year, was declined in a communication to be found on page 13 of the Record.

On March 19, 1900, the trustee under the will of Catherine Pearson begun suit against the complainants, the Baltimore and Ohio Railroad Company, before Lewis I. O'Neal, Justice of the Peace, for the possession of the lot referred to. In that court, without trial, judgment was entered for the plaintiff and the case appealed to the Supreme Court of the District of Columbia and docketed as suit at law No. 43,895.

On August 15, 1900, the trustee again brought suit against the Railroad Company in the Supreme Court of the District of Columbia, at Law No. 44,106, for the use and occupancy of said lots in controversy, claiming $6,500, with interest from the 16th day of April, 1900.

On the 4th day of October, 1900, the Baltimore and Ohio Railroad Company, the appellee here, filed its bill in the present case, whereupon the defendants were restrained as prayed in the bill (Rec. pp. 13 and 14)

On October 15 the defendants' answer was filed, and thereupon the restraining order referred to was continued until the final hearing of the case. Testimony was taken, and on the 25th day of February, 1901, at the final hearing before Justice Barnard, holding the Equity Term of the

Supreme Court of the District of Columbia, the bill was dismissed.

Upon appeal to the Court of Appeals of the District of Columbia, the judgment of the lower court was reversed, and the opinion of that court will be found on page 74 of the Record, the opinion of Justice Barnard, of the Supreme Court, appearing on page 70 of the Record.

II.

ARGUMENT.

The appellants in this court assign as error:

(1) That the Court of Appeals erred in holding that the Railroad Company was entitled to a renewal of the lease after July 31, 1897; and

(2) That the court erred in holding that the lease of October 17, 1892, signed by Francis Winslow alone, conferred any right upon the complainant; and

(3) That the court erred in holding that the complainant was at any time vested with the power of condemnation of the land described under the right of eminent domain; and

(4) That the court erred in not affirming the decree of the Supreme Court in dismissing the bill; and

(5) That the court erred in enjoining the appellants from prosecuting their actions at law; and the appellee here takes up these various assignments of error in their order.

III.

By the terms of the lease of 1892 it was provided that at the request of the lessee the lessors should renew the lease

for five years additional, *or until the lessors should be prepared* to convey a good title in fee, and in case the lessee should omit to make said request *at or before* the expiration of said term, the lessors were required to notify the lessee of the expiration of the lease, *and require it to exercise its election to renew the lease.* The lease of 1892 did expire and there was no request for a renewal at or before its expiration. Did the trustees require the Railroad Company to exercise its election? Most certainly they did not. In his letter to Mr. Colbert Mr. Winslow states—

> "the renewal of the lease has always been under the same reciprocal conditions and obligations, and I do not feel authorized to change them, but *I suggest*, as we are now able to furnish a satisfactory title, the present as a suitable time to transfer the property."

Under the provisions of the lease of 1892, the Railroad Company had the absolute right of renewal for a further term of five years from and after August 1, unless the trustees refused to renew the lease and accompanied their refusal by a tender on their part of a conveyance of a good title in fee simple thereto.

Mr. Winslow made no such tender. It is not pretended that Mr. Jay was in a position to execute a conveyance or that he was even in this country. There is no showing made that a deed was even prepared and ready for execution or that the formalities required by the will of Mrs. Pearson had been complied with. Until this was done, certainly the Railroad Company had the absolute right to the renewal until such time as the trustees were in position to tender a deed. It is not pretended that there is any showing in this record that the trustees were even in a position to tender a deed other than the naked statement of Winslow that the present was a suitable time to make the transfer.

IV.

The Lease of 1892 Executed by Winslow Alone was Sufficient to Entitle the Lessee to a Further Renewal in 1897.

In his letter of September 27, 1897, Winslow explicitly states that the renewal of the lease (including, of course, the lease of 1892) has been under the same reciprocal conditions and obligations. Until 1892 the leases were signed by all the trustees. The lease of 1892 was signed by Winslow only. Assuming that the lease of 1892, executed by Winslow alone, and acted upon by Mrs. Patterson and ratified by her, constituted a valid and binding contract, we contend that under the terms of the instrument the Railroad Company was entitled to a renewal of the lease for five years from August 1, 1897, and if that be so, clearly the suits at law could not have been maintained and should have been enjoined.

Mrs. Pearson's will (Rec. p. 27) devised the property in controversy to her trustees in trust for Mrs. Patterson for life, with power in the life tenant to receive the rents and income therefrom and if she so desired to use and occupy the property herself. The trustees are given no active control over the property during the lifetime of Mrs. Patterson, who had the right to receive all the income therefrom, or if she so preferred, to use it herself, but before Mrs. Patterson could receive these rents she must first have received permission from the trustees so to do. The lease of 1892, signed by Winslow alone, was acquiesced in by Jay, the only other trustee at that time existing. No complaint was ever made by him that Winslow had exceeded his authority, and it must be presumed that in executing the lease which purported to be from all the trustees, that he was acting for all the trustees by their authority,

and certainly he was acting by the authority of Mrs. Patterson, who for five years recognized the validity of the lease and received all the benefits to which she was entitled thereunder. If we assume, therefore, that this lease of 1892 was valid and binding, then, on August 1, 1897, the Railroad Company was entitled to a renewal for a further term of five years. Why were they not so entitled? Mrs. Patterson, the life tenant, recognized the right to a renewal by demanding and receiving six months' rent after August 1, 1897, because Judge Cox, one of the trustees, had resigned and the only other trustee was absent from the United States. The rents were regularly paid to the life tenant, the party entitled to possession from 1892 to 1897 and after August 1, 1897. As late as February, 1898, Mrs. Patterson states that the draft sent her on January 28, 1898, to the order of Winslow, could not be cashed because he was in the country, but that Mr. Cox and Mr. Jay were both in Washington and they would indorse it, although, as a matter of fact, Judge Cox had long before ceased to be trustee. This statement on the part of the life tenant, however, clearly indicated that all the trustees were familiar with the existence of the lease of 1892 and ratified its execution by their long-continued silence, if not by their express ratification.

Winslow was clearly the agent of the other trustees and of Mrs. Patterson herself in the execution of the lease of 1892, and his act bound them all.

See—

Tiffany and Bullard on the Law of Trusts and Trustees, p. 539 et seq.
Ex parte Rigby, 19 Ves., p. 463.
Sinclair *vs.* Jackson, 8 Cowen, 543.
Bowers *vs.* Seegers, 8 W. S. 222.
Abbot *vs.* The Rubber Co., 33 Barb. 579.
Leggett *vs.* Hunter, 19 N. Y. Rep. (5 Smith), 445.
Messeena *vs.* Carr, 9 L. R. Eq. 260.

In Messeena *vs.* Carr, *supra*, the court said:

> "I had some doubts at first whether the discretion was to be exercised by the two trustees, and only one had acted, the discretion had been properly exercised, but I have come to the conclusion that as the other trustee approved and sanctioned what was done by the one who made the payments, no breach of trust was committed."

And actions unauthorized when performed by a single trustee in respect to the trust estate, may be subsequently ratified and validated either in writing or *in pais* by his co-trustee.

> Insurance Company *vs.* Chase, 5 Wallace, 512.
> Blanchard *vs.* Waite, 28 Maine, 39.
> Messeena *vs.* Carr, *supra.*

In Insurance Company *vs.* Chase the Supreme Court says:

> "But it is argued that the legal title to the Congregational Church was vested in five trustees, and that to give validity to their acts they must act jointly in whatever they do for the benefit of the property. It is true that in the administration of the trust, where there is more than one trustee, all must concur, but the entire body can direct one of their number to transact business which it may be inconvenient for the others to perform, and the acts of the one thus authorized are the acts of all and binding upon all. The trustee thus acting is to be considered the agent of all the trustees and not as an individual trustee. If within the scope of his agency, he procures an insurance, it is for the other trustees as well as himself. If he does it without authority, still it is a valid contract, which the underwriter can not disdispute, if his co-trustees subsequently ratify it."

The lease of 1892 was executed with the full knowledge of Mrs. Patterson, who not only received all the rents under it, but on numerous occasions wrote to the lessees recognizing the existence of the lease and asking for payments

under it. If Mr. Jay attempted to perform any of his duties as trustee he must have known of the existence of the lease, and if he did not actually know of its existence he must have committed the management of this business to his co-trustee, Mr. Winslow, and must be held to have ratified his action in signing the lease of 1892. But there is another view of this matter to be taken. Mrs. Patterson clearly authorized and ratified and acted under the lease of 1892. She alone was entitled to receive the rents from this property and to use it herself if she so desired. The trustees, with respect to the mere right of leasing, had no active duties to perform, certainly while Mrs. Patterson lived, and her ratification of Winslow's act was as effectual to validate the lease, if it required validation, as if she had signed the lease itself or had authorized any other agent so to do. If then this lease signed by one trustee and ratified by the other and by the beneficiary was valid, then the Railroad Company was entitled to a further renewal of the lease in 1897. When the time came for that renewal, and when a renewal was requested, Winslow did not refuse to renew, but said he would *prefer* executing a conveyance to renewing the lease. He did not exhibit the written request of Mrs. Patterson to sell. He did not even state that she had consented. He did not return the six months' rent paid after August 1, 1897, and which had been collected by the life tenant.

The authorities cited by the appellants upon pages 15a, 15b, 15c, 15d, 15e, and 15f, are all to the point that the force and effect of the lease of 1888 were limited to a term of five years from August 1, 1887, and a single renewal thereof for five years additional, or until July 31, 1897. Even if the appellee were to admit the correctness of this position it does not touch the force and effect of the lease of 1892 signed by Winslow alone. While it is true as a general proposition that where property is vested in more than one trustee having active duties to perform, any instrument dealing with the property must be executed by all the trus-

tees, in this particular instance Mrs. Patterson had absolute control of the property in dispute so long as she lived and could have executed a valid lease binding upon her life estate without the signature of any of the trustees. Moreover, in this particular instance one of the trustees did sign the lease and on August 21, 1893, as appears by page 63 of the Record, nearly a year after the execution by him of the lease of 1892, directed the real estate agent of the Railroad Company to pay rent under the lease, and as appears from page 67 of the Record, on October 15, 1892, Mr. Winslow executed the lease of 1892 and forwarded it in duplicate to Thomas J. Fisher & Co., its general agents.

No pretense is made in this letter that Mr. Jay's signature was necessary to make the lease a completed instrument. On the contrary, on October 17, 1893, Mr. Winslow was advised by his agents that the lease executed by him had been forwarded to the Railroad Company, and on the same date the lease was forwarded to the Railroad Company by Mr. Winslow's agents, and a day later the same agents notified the Railroad Company that Judge Cox has resigned as trustee and that Mr. Jay was in Paris, and from that time to the present moment nobody has ever pretended that Mr. Jay repudiated the act of his cotrustees in executing the lease in question and in delivering it as a completed instrument.

We submit that there is no force and no merit in the contention that the act of Mr. Winslow in signing the lease of 1892 was accidental or negligent. On the contrary, he states himself, as will appear from page 11 of the Record, that the lease was renewed from time to time and was always renewed on the understanding that the Railroad Company had the right to buy the property ultimately whenever the trustees were in a position to make a valid conveyance. It would seem that the suggestion now made for the first time that in executing the lease of 1892 Mr. Winslow desired merely to put into written form the covenant of renewal for

a single term of five years contained in the lease of 1888, is a mere subterfuge and is contradicted by every document and every letter signed by him and which appears in this record.

V.

Since the preparation of the body of our brief, and when a hearing of the cause was imminent, we received a copy of the brief for the appellants, and while time will not permit us to make a full reply, we wish to call the attention of the court particularly to the third assignment of error, and to the argument in support thereof.

The object of this suit was to protect the Railroad Company in its right to occupy vacant lots with the tracks of its Metropolitan branch, which occupation was threatened by certain suits at law brought by the appellants, to recover this property, which the appellee claimed it had the right to occupy by reason of a provision for the sale and purchase of the same, and the right of renewals contained in a series of leases from 1872 to 1897. To establish this right of possession the appellee sought primarily to restrain these suits, and to enforce its rights under the contracts referred to.

It appears from the pleadings (paragraph 3 of the bill) that the property was first acquired, and has since been held, by the defendant in error for the construction of its Metropolitan branch, and the use of the property by the defendant in error is referred to in a letter from Francis Winslow, one of the trustees (Rec. p. 11), and by Mrs. Carlisle P. Patterson, the beneficiary under the will of Catharine Pearson (Rec. p. 60). These considerations did, we submit, constitute in the pleadings and proof sufficient matters of fact to authorize the Court of Appeals to consider the power of the appellee to exercise the right of eminent domain with regard to its protection in the occupany of said lots, especially when by doing so the court could avoid the unnecessary exercise of its discretion in decreeing speci-

fic performance, as prayed for in the bill. It is further submitted in this regard that this and similar questions raised by the record, do not stand upon the basis of a controversy between two private individuals. The occupation of this land by the appellee with its Metropolitan branch is not a question between the parties to this suit only, but it is a question in which the public has even a larger interest than either of the parties.

This road is a common carrier of passengers, leading to and built within the limits of the National Capital; it is a carrier of United States mail, and as was stated in the case of Joy *vs.* St. Louis, 138 U. S., page 47—

> "*Considerations of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court. These considerations have been recognized and applied by this court in several cases.*"

And again on page 50:

> "*Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation.*"

The power of the appellee to exercise the right of eminent domain, both upon its Washington branch and its Metropolitan branch and within the District of Columbia, has, without question, been frequently exercised, and we submit is conferred fully by the several acts relating to this company.

The act of 1831 does contain the provision cited on page 30 of the appellant's brief, which would seem to limit the

right of condemnation to the District outside of the city limits, and within the District to specified streets and alleys; but it was found necessary to depart from this limitation, and supplemental acts were from time to time passed, and in the act of 1835, 4th Statutes, 757, the defendant in error is permitted to construct its line in the city through certain enumerated squares—

> "*in the same manner and with the same rights and privileges, which are granted to it by the act to which this is a supplement, within the District of Columbia, beyond the limits of the city of Washington,*"—

and beyond the city of Washington it had the right to condemn. In the third section of this same act it is provided that if the route should pass through any unimproved lots or squares, except public reservations, it might construct the same upon the same terms and with the same privileges as are prescribed for passing through squares enumerated in the first section of this act. And immediately afterwards, in section 4, the appellee is authorized to construct branch roads over the main stem within the city of Washington, to such place or places as the corporate authority of the city of Washington should assent to, or permit, and the only limitation is that such branch roads should not pass through public reservations.

Thus it would appear that Congress, which, in the beginning, was unwilling to give to the appellee (the first railroad company to build a railroad to and within the National Capital) the right to exercise the power of eminent domain within the city limits, soon found it useful, and even necessary, to depart from this rule, and from time to time extended the power of this company, until, as above stated, it practically did away with its restrictions, and provided that it might exercise this right, not only in certain enumerated squares, but in other squares, if such other squares were needed to complete its line, and even authorized it to build branch roads within the District, which

could only be done, as it had been found in the construction of the original line into Washington, by the condemnation of private property in proper cases.

When, therefore, Congress was, on July 25, 1866, called upon to—

> "authorize the extension, construction and use by the Baltimore and Ohio Railroad Company of a railroad from between Knoxville and Monocacy Junction into and within the District of Columbia"—

which is known as the Metropolitan branch, it authorized the appellee to extend into and within the District of Columbia the road aforesaid—

> "to such point or points, terminus or termini, as may be agreed upon between the said company and the corporation of Washington"—

and gave to it the same rights and privileges as it possessed or was subject to within the State of Maryland, under and by virtue of its charter or act of incorporation from said State, and gave to it also the same franchises, rights, compensations and benefits, as was provided in said charter. It made also, as far as were applicable, all the provisions of the several acts of Congress relating to the construction and use of the lateral branch of the Baltimore and Ohio Railroad within the District of Columbia, and the supplements thereto. When it is considered that in this last named act, the line within the city was not confined to streets and alleys, that even its terminus within the city was not limited, and that it was clearly intended by Congress to give to the appellee, in the construction of this, its Metropolitan branch, all of the rights, benefits and privileges conferred upon it by the several acts of congress and by its charter from the legislature of Maryland, which charter gives very fully the power to exercise the right of eminent domain, it can not, we think, be seriously contended that the appellee is without the power

to exercise the right of condemnation within the District of Columbia. All of the acts of Congress referred to, as well as the charter from the legislature of Maryland, and all of the provisions of these several acts, will be taken and considered with reference to the subject-matter contemplated, and the ends to be accomplished by the corporation for the purpose of determining the intention of Congress in regard to the exercise of the right of eminent domain. This is a recognized principle of construction. It has been held that—

> "*courts will give the charter such a construction as is necessary to effectuate all the powers, privileges and immunities conferred by it, and is necessary to carry into full effect its purposes and objects. It is upon this principle that it is held that a charter authorizing the construction of a railroad from one point to another, carries with it authority to take lands necessary for that purpose, although such authority is not expressly given.*"
>
> Wood on Railroads (2d Edition), Vol. 1, p. 14, and cases cited.

It will be borne in mind that in the act of July 25, 1866, authorizing the construction of the Metropolitan branch of the Baltimore and Ohio Railroad, Congress does not fix its terminus in the city of Washington, and does not, as in the old charter, attempt to confine its lines to streets, or to confine its location or lines in any degree; so that even if there is no express grant of the power to exercise the right of eminent domain, it is clearly and completely implied, not only from the intention of Congress as indicated in the several acts referred to, but from the authority given the appellee to build this branch road without restriction as to location and route. This contention is supported by all of the text-writers, and their position sustained by authorities cited. Thus, in Beach on Private Corporations, Vol. 2, page 654, it is stated that—

> "*although the power of eminent domain may not have been expressly delegated to a corporation, yet if the enter-*

prise which it is organized to conduct appears, from its charter and the circumstances of the case to be of a public nature, the power is deemed to have been granted by implication."

VI.

It is contended next that the decree of the trial court dismissing the bill should have been affirmed, because the sole object and aim of the bill was to enforce an alleged contract of sale, and that the record shows no contract that was enforcible.

We submit that this is a misapprehension of the scope and object of the bill. The bill was filed primarily for the purpose of enjoining the defendants from interfering with the possession by the complainant of the property in dispute. It was primarily a suit for injunction, and in addition to that the bill prayed that the defendants might be required to execute a formal instrument of lease for five years, from August 1, 1897, and if for any reason shown in the bill, the complainant was entitled to have the suits at law enjoined, the bill should have been sustained. If the complainant was entitled to have the lease of 1892 renewed, then the injunction should have been allowed, and to that extent at least, the decree of the trial court dismissing the bill was erroneous and the Court of Appeals properly reversed that decree. But we contend that the contract of sale in this case was enforcible. A court of equity in most instances will regard the doctrine of specific performance as a matter of discretion to be governed by the particular circumstances of each case, and in this instance it is peculiarly appropriate that the discretion should have been exercised in favor of the complainant. As far back as 1872, the Railroad Company was in negotiation for the purchase of this property, but could not buy because of a defect in the title. The whole object and purpose of the various leases and renewals thereof was to enable the Railroad Company to

purchase this vacant ground for the purpose of its right of way. This purpose was manifested time and time again by the trustees and by the life tenant in every possible way. Mrs. Patterson recognized in writing over her own signature the existence of the contract, and she is now estopped from denying the authority of the trustees to make a binding contract for the sale of the property under the terms of Mrs. Pearson's will. These contentions and restrictions were intended for her benefit and protection and she had the power to waive them.

The other assignments of error relied upon by the appellants have been considered as fully as has been possible in the short time that the appellant's brief has been before us, and we therefore respectfully submit that the decree of the Court of Appeals should be affirmed.

G. E. HAMILTON,
M. J. COLBERT,
Counsel for Appellee.